Supreme Court, U.S.
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No. 90-1427

In The

Supreme Court of the United States

October Term, 1990

MARILYN SLAY, as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased; MARILYN L. SLAY, Surviving Spouse and Widow of JAMES ALBERT "BERT" SLAY; MARILYN L. SLAY, as Natural Mother and Next Friend of MELISSA F. SLAY and JAMES AARON SLAY, Minor Children of JAMES ALBERT "BERT" SLAY, Deceased; and MARILYN SLAY as duly appointed representative of JAMES H. SLAY and ANITA MAXINE SLAY, Surviving Parents of JAMES ALBERT "BERT" SLAY, Deceased,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must a federal district court, presiding over an action based on diversity jurisdiction, recognize a party's substantive right to *voir dire* the jury panel required by the courts of the State in which it sits under the choice of law doctrines established by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer, Executor*, 380 U.S. 460 (1965)?

II. Is it a violation of a plaintiff's Seventh Amendment right to jury trial for the federal district court, acting under the putative authority of F.R. Civ. P. 47(a), to deny plaintiff both: her request to conduct *voir dire, and* her submission of *voir dire* questions to be asked by the court, where those questions have material bearing on the fairness of the judicial process?

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No. _____

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Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Marilyn L. Slay, respectfully prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the

Tenth Circuit entered in this proceeding on December 21, 1990.

OPINIONS BELOW

The Order and Judgment of the Court of Appeals appears in its unreported form as Appendix A hereto. The Judgment of the District Court for the Northern District of Oklahoma appears in its unreported form as Appendix B hereto.

JURISDICTION

Invoking federal diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332, petitioner brought suit against the Ford Motor Company in the District Court for the Northern District of Oklahoma. On August 22, 1989, the District Court entered judgment for the respondent. Petitioner then appealed to the Tenth Circuit Court of Appeals.

The Order and Judgment of the Tenth Circuit Court of Appeals was entered on December 21, 1990. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:

In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 2072 Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not *abridge*, enlarge or *modify* any *substantive right* and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. (Emphasis supplied)

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rule of Civil Procedure. 47 (a) Examination of Jurors

The Court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

STATEMENT OF THE CASE

Petitioner's decedent, James Albert Slay, a police officer, was injured on October 28, 1986, when his Ford LTD patrol car unexpectedly moved toward a parked truck and pinned the decedent between the car and the truck, thus breaking his hips. Officer Slay died fourteen days later from complications attributable to the accident.

This suit was brought upon a theory of manufacturers' products liability for wrongful death, based upon the defective design of Ford's transmission control system and its failure adequately to warn customers and drivers.

The case was tried before a jury of six persons and two alternates from July 25, 1989 through August 9, 1989. The District Court entered Judgment on August 22, 1989, in favor of the respondent in accordance with the jury's verdict.

The District Court repeatedly denied Petitioner's written and verbal requests to conduct *voir dire* of the jury panel. In addition, the District court likewise rejected requests of Petitioner to include questions addressing the serious potential for bias and prejudice concerning the "Tort Reform" controversy in its own conduct of the *voir dire*. Both these omissions of the District Court were properly raised as issues on appeal before the Tenth Circuit Court of Appeals. On December 21, 1990, that Court entered its Order and Judgment in which the issues related to *voir dire* were treated in cursory fashion. Opinion below at Appendix A. App. 1-19. Significantly, the Court of Appeals erroneously states that Plaintiff failed to raise this objection in the trial court. App.16-17. However, see Appellants' Amended Brief, Appendix C at App. 24, where this petitioner cites the pages where objection is found. The language of the objection is in the trial record at Appendix D, at App. 27-29, to wit:

> MR. BEUSTRING: . . . The Court is aware of my serious concern and request for *voir dire*, lawyer-conducted *voir dire*, which I understand the Court has denied.
>
> THE COURT: Yes.
>
> MR. BEUSTRING: And which I think it's my obligation for the record to say that I think it's in violation of the Seventh Amendment right to an unbiased jury selected by their lawyer. However, I am concerned because of the publicity in

this community not only from the papers but from a great deal of invested dollars to foster the idea of reckless jury awards, to foster the idea of a lawsuit crisis, and I would assume that these jurors will come in here somewhat prejudiced. And *I'm asking the court to make sure that at least in this case that they will put aside any preconceived notions and give this family a fair trial and put aside any type of prejudices or biases concerning our system of jurisprudence,* because I think it's been a form of jury tampering that's been going on. Consumers of America have not put any money up to counter that, what I believe to be over a hundred million dollars spent. And if I had enough time and a little money and a little authority I think I could prove that. But that's the serious concern I have. [Emphasis supplied].

THE COURT: I understand. But this Court in this case cannot resolve all the differences between plaintiffs and defense bar in the United States –

MR. BEUSTRING: That's true, but you can assure us –

THE COURT: – between the insurance industry and the plaintiff's lawyers. I can't solve all of those. All I can do is *voir dire* this jury in a hope and a belief that we can come up with one that is available to fairly decide this case. That's what we're going to do.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The decision below is in conflict with the rule that a federal district court, presiding over an action based on diversity jurisdiction, must recognize the substantive right of a party to *voir dire* the proposed jury panel required by the courts of the State in which it sits under the choice of law doctrines established by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Hanna v. Plumer, Executor*, 380 U.S. 460 (1965).

This Court set the standard of review for application of federal or state law under the *Erie* doctrine in *Hanna v. Plumer, Executor*.[1] The question raised by that case was whether service of process shall be made in the manner prescribed by state law or that set forth in Rule 4 (d)(i) of F. R. Civ. P. In the process of answering that question in favor of application of the federal rule, this Court set out a three part test for determining the applicability of a particular federal practice:

1) Whether a Federal Rule actually governs the practice under consideration; if so,

2) Whether there is a direct conflict between State practice and a Federal Rule; if so,

3) The Federal Rule is presumed valid only if it fits within the constraints of the Rules Enabling Act.[2]

The Rules Enabling Act, in pertinent part, states that, "Such rules [of practice and procedure of the federal district courts] shall not *abridge*, enlarge or *modify* any

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[1] 304 U.S. 64 (1938); 380 U.S. 460 (1965).

[2] *Hanna*, 380 U.S. at 462-466.

substantive right and shall *preserve* the right of trial by jury . . . ".[3]

Applying the *Hanna* standards to the facts of this case, clearly there is a Federal Rule that governs the practice under consideration.[4] However, there is also a direct conflict between the Oklahoma State practice and this Federal Rule. Oklahoma State practice, affirming the right of a party to *voir dire*, is set out in *Kizer v. State* and Rule 6 of the Rules for District Courts for Oklahoma, as a matter of right.[5] Such a practice is in direct conflict with

[3] 28 U.S.C. § 2072 (emphasis added).

[4] F. R. Civ. P. 47 (a)

[5] 93 P.2d 58, 88 (Okl. Cr. App. 1939). ("Either party has the *right* to ask jurors pertinent questions for the purpose of determining whether he desires to exercise a preemptory challenge") Rule 6 of the Rules for District Courts of Oklahoma provides:

> RULE 6. *VOIR DIRE* EXAMINATION. The judge shall initiate the *voir dire* examination of jurors by identifying the parties and their respective counsel. He may outline the nature of the case, the issues of fact and law to be tried, and may then put the jurors any questions regarding their qualifications to serve as jurors in the cause on trial. The parties or their attorneys *shall* be allowed a reasonable opportunity to supplement such examination. Counsel shall scrupulously guard against injecting any argument in their *voir dire* examination and shall refrain from asking a juror how he would decide hypothetical questions involving law or facts. Counsel shall avoid repetition, shall not call jurors by their first names or indulge in other familiarities with individual jurors, and shall be fair to the court and opposing counsel. (Emphasis supplied).

any application of Rule 47 (a) that would have the effect of denying lawyer-conducted *voir dire*.[6]

As to the last element of the *Hanna* test, reconciling the Federal Rule to the limitations of the Rules Enabling Act, it is important to note the Act has two requirements. First, no Rule passed thereunder shall *abridge* or *modify* any "substantive right." The question raised by this first factor, clearly, is whether Oklahoma's guarantee of a party's right to *voir dire* rises to the level of a substantive right. This question, although of paramount importance to resolution of the *voir dire* issue, was not even discussed by the Court of Appeals.

Under the guidelines of Supreme Court Rule 10.1 this presents a "special and important" question for consideration by the Court. In addition, under 10.1(a), this is a case where the application of a Federal Rule is in direct conflict with a rule and Court holdings of the State court of last resort.

The second requirement stated by the Rules Enabling Act is that no federal rule shall impinge on the right of trial by jury. As argued in the second question below, the allowance of either a party conducted *voir dire* or the

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[6] It could be argued that the Federal and State rules on this matter are sufficiently reconcilable to avoid the *Erie – Hanna* analysis altogether. Such accommodation was recommended, when possible, by Circuit Judge, now Justice, Scalia in *Answering Service, Inc. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984). Whereas Oklahoma practice requires that a party or their Counsel be allowed a reasonable *voir dire*, F. R. Civ. P. 47 (a) makes it merely optional in Federal Court. By exercising that option, the trial court could have prevented any conflict between the two rules.

asking by the court of questions submitted by a party is so fundamentally integral to impartiality as to be the *sine qua non* of the right itself.

II.

Even though acting within the apparent authority of F. R. Civ. P. 47(a), it is a violation of a Plaintiff's Seventh Amendment right to an impartial jury trial for the federal district court to deny *both* a party's right to *voir dire* the jury panel, *and* questions submitted that have a material bearing on the fairness of the judicial process.

In a case similar to the one at hand[7], a Connecticut State Constitutional requirement preserving the right of counsel to question jurors individually was held not to bind a federal district court in a diversity action. While this decision superficially seems to support the Tenth Circuit's holding in *Slay*, note that in *Perry* the Court went on to say, "We find no prejudice from the trial judge's ruling as to conduct of the *voir dire since* he asked *all* the questions which appellant requested."[8] It is significant the Second Circuit found that denial of lawyer conducted *voir dire* was not error *expressly* because the court granted counsel's offer of requested questions. In *Slay*, the trial court *neither* permitted counsel to conduct *voir dire nor* asked counsel's pertinent questions directed to the exposure of bias. Such total preclusion of a party from the jury interrogation process was once equated by Patrick Henry with the denial of jury trial: "I would

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[7] *Perry v. Allegheny Airliner, Inc.*, 489 F.2d 1349 (2d Cir. 1974).

[8] *Id.* at 1352 (emphasis added).

rather the trial by jury were struck out all together [if] [t]here is no right of challenging partial jurors . . . the right is as valuable as the trial by jury itself."[9]

The Tenth Circuit Court has previously observed,

> The very purpose of *voir dire* examination is to develop the whole truth concerning the prospective jurors' state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' suspected bias or prejudice.[10]

The test of a properly conducted *voir dire* is not whether there was prejudice in fact, but whether the procedure used was reasonably certain to discover the possibility of prejudice that may have existed.[11] Stated another way, the Appeals court must consider whether "questions submitted by [counsel] were important to the informed exercise of his right to challenge prospective jurors."[12] Despite the apparent lack of qualification on the face of F. R. Civ. P. 47(a), in application it has been repeatedly held that the judge's discretion is subject to the right of the parties to an impartial jury and may be abused when limitations placed on the parameters of *voir dire* threaten to undermine the purpose for conducting the examination.[13] The conduct of a merely perfunctory

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[9] ELLIOT, DEBATES, VIRGINIA 541-542.

[10] *Photostat Corp. v. Ball*, 338 F.2d 783, 785 (10th Cir. 1964).

[11] *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Fietzer v. Ford Motor Co.*, 622 F.2d 281 (1980).

[12] *Darbin v. Nourse*, 664 F.2d 1109, 1114 (9th Cir. 1981).

[13] *Fietzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980).

voir dire by the trial court is not sufficient to guarantee impartiality.[14] Only thirteen generic questions were asked by the Trial court below.

In the case at bar, the trial court denied plaintiff's written request for lawyer-conducted *voir dire*, Doc. #113, Plaintiff's Motion to Allow Attorney-Conducted *Voir Dire*, by written Order dated April 19, 1989, Doc. #147.[15] The subsequent *voir dire*, as conducted by the court was wholly inadequate to reveal the possibility of prejudice among veniremen concerning their exposure to propagandistic outcries against the excessiveness of personal injury litigation.

In such a case, judicial *voir dire* cannot be a constitutionally permissible substitute for the right of a litigant to have his or her counsel probe and uncover reluctant bias or prejudice of prospective jurors. It is in recognition of this limitation that the American Bar Association has actively supported changes to Rule 47(a) in order to guarantee the right of counsel to propound questions directly to the jurors.[16] Further, "[l]egislation to require

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[14] *United States v. Whitt*, 718 F.2d 1494 (10th Cir. 1983).

[15] MOTION TO ALLOW ATTORNEY TO CONDUCT *VOIR DIRE*

> The court has carefully reviewed Plaintiffs' motion to allow attorney to conduct *voir dire*. Although the court declines to accept such practice and thus denies Plaintiffs' motion, the court will thoroughly evaluate all *voir dire* questions submitted by Plaintiff and will inquire of the veniremen in all areas deemed relevant by the court.

[16] 62 ABA J. 1282 (1976). Note, *Restore Right to* Voir Dire, *House Votes*, 62 ABA J. 1282 (1976).

courts to allow *voir dire* examination by counsel is being considered. S. 953, 954, 100th Cong., 1st Sess., 133 Cong. Rec. 4862-64 (1987)."[17]

In a carefully argued concurrence by Chief Judge Lay, the position is strongly supported by precedent and legislative history that Rule 47(a) was drafted "in contemplation of lawyer participation."[18] The proper reading of 47(a) is to allow the judge to permit counsel *either* to conduct his own *voir dire or*, at the least, to participate effectively through the submission and reading of appropriate inquiries. It is not intended that the trial judge should have the power arbitrarily to preclude counsel from the process altogether.

In *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981), a civil case was reversed for inadequate *voir dire* by indicating "that he [the judge] would consider the proposed questions, ask those which he thought proper, and remain open to counsel's suggestions for further inquiry. . . ."[19] Without even resorting to the reasoning of the Seventh Amendment, the Appeals Court found as a *procedural* matter that a *voir dire* too "perfunctory to allow the intelligent exercise of peremptory challenges" was an abuse of discretion, the judge's assurances notwithstanding.[20] In *Harold, supra*, it was precisely the Seventh Amendment concerns that were primary. Judge Lay noted that the "critical importance of a truly fair and impartial

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[17] *Harold v. Corwin*, 846 F.2d 1148, 1149 n.2 (8th Cir. 1988).

[18] *Harold*, at 1452.

[19] *Id.* at 1111.

[20] *Id.* at 1112.

jury is essential to due process in the adversary system and basic to our conception of jurisprudence."[21] More importantly, a proper and thorough *voir dire* is absolutely indispensable to insure that this fundamental right will be secured.

The trial judge's preclusion altogether of Plaintiff's counsel from the *voir dire* process constitutes a fundamental and reversible error.

The trial court was specifically requested to address the serious potential of bias or prejudice concerning the controversy over "Tort Reform" in its *voir dire* of the jury. Plaintiffs filed a Special Motion, Brief, and specific requested questions. Doc. #'s 113, 114, 112 respectively.

In contradiction to the observation by the Tenth Circuit that Plaintiff failed to raise this objection in the record, Plaintiff's raised it repeatedly. As the Appellate Court notes, the trial court did ask whether any juror possessed "any *religious* belief or attitudes toward lawsuits" that could affect his or her view of the case.[22] However, an examination of the exchange between Plaintiff's Counsel and the Court will reveal clearly that the term "religious" here was used to qualify both "beliefs" and "attitudes". In no way did this question address the possibility of juror bias due to exposure to the media controversy over tort reform. The opinion of Justice Mauzy in *Babcock v. Northwest Memorial Hospital*, has a compelling sense of relevance:

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[21] *Harold*, at 1153.

[22] Order and Judgment of the Court, App. A, A-16.

> The trial court's actions, which resulted in the denial of the Babcocks' constitutional right to trial by a fair and impartial jury, was harmful. [Citing case authority]. We hold that the trial court's refusal to allow questions during voir dire addressing the alleged "liability insurance crisis" and "lawsuit crisis" was an abuse of discretion and was reasonably calculated to cause and probably did cause the rendition of an improper judgment. [Citing Texas Appellate Procedure Rule].[23]

Consider the conclusion of distinguished commentator and legal educator, Dean John W. Wade, Reporter for the *Second Restatement of Torts*:

> Many of the ads on television and in newspaper columns as promulgated by insurance organizations are quite misleading and are intended to lead the public astray.[24]

In *Kiernan v. Schaik*, 347 F.2d 775 (3d Cir. 1965), the court drew the meaningful distinction between the procedural matter of who conducted *voir dire* and the more critical question of substantive conduct. While conceding the trial court's "broad discretion" in procedural matters, the court emphasized that it is "subject to the essential demands of fairness."[25]

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[23] 767 S.W.2D 705 (Tex. 1989)

[24] Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, **24 HOUSTON L. REV.** 81 (1987). See also *Borkoski v. Yost*, 594 P.2d 688 (Mont. 1979).

[25] *Id.* at 778, quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931); *Seller v. United States*, 271 F.2d 475 (D.C.1959).

Significantly, the *Kiernan* case relied very strongly on the constitutional implications urged in the present instance:

> The right to an impartial jury in the federal courts in civil and criminal cases is guaranteed by the Constitution . . . and although the impartiality of the jury is not expressly mentioned it is inherent in the right of trial by jury and is implicit in the requirement of the Fifth Amendment that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "[26]

In addressing the importance of questions submitted by the attorney, the court observed,

> A jury's impartiality may not be assumed without inquiry . . . The traditional right of peremptory challenge recognizes that matters of bias or prejudice may be sensed or suspected without possibility of proof, and therefore permits counsel to exercise his inarticulate instinctive judgment, which he need not, if he could, attempt to justify.[27]

It is respectfully urged upon this Court that the "essential demands of fairness" have not been met in the record presented before it. Further, in such an instance where the challenge to application of a rule is based on federal Constitutional grounds, "abuse of discretion" is an inappropriate standard of review.

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[26] *Kiernan*, at 778.

[27] *Kiernan*, at 779.

CONCLUSION

Under Rule 10.1 of the Rules of the Supreme Court, certiorari should be granted in any case for "special and important reasons" and for conflicts between rulings of a court of appeals and a state court of last resort. Given this Court's prior interpretations of the Rules Enabling Act, and the Seventh Amendment's guarantee of impartial jury trial, the complete preclusion of a party from the conduct of *voir dire* in federal district court raises precisely such an opportunity for review. It constituted error for the Tenth Circuit Court of Appeals to dismiss summarily this question of constitutional fairness by invoking the "abuse of discretion" standard.

For the reasons set forth above, petitioner respectfully requests that this petition for writ of certiorari to the U.S. Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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DATED THIS 8th DAY OF MARCH, 1991.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARILYN SLAY, as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased, on behalf of the Estate of JAMES ALBERT "BERT" SLAY, Deceased; MARILYN L. SLAY, Surviving Spouse and Widow of JAMES ALBERT "BERT" SLAY; MARILYN L. SLAY, as Natural Mother and Next Friend of MELISSA F. SLAY and JAMES AARON SLAY, Minor Children of JAMES ALBERT "BERT" SLAY, Deceased,	)	No. 89-5157 (D.C. No. 87-C-930-E) (N.D. Okla.)
Plaintiff-Appellant	)	
JAMES H. SLAY; ANITA MAXINE SLAY, Surviving Parents of JAMES ALBERT "BERT" SLAY, Deceased,	)	
Plaintiffs,	)	
v.	)	
FORD MOTOR COMPANY,	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT*
(Filed Dec. 21, 1990)

Before MOORE, TACHA, and BRORBY, Circuit Judges.

The Appellant (hereinafter "Plaintiff") in this case is the widow of James Albert "Bert" Slay.[1] She presses this

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[1] There is a threshold question about whether the parents of James Slay are appealing from the district court's judgment. This question exists because of discrepancies in the notice of appeal and the Plaintiff's brief.

The body of the notice of appeal states: "MARILYN SLAY, Plaintiff above named, by and through her attorney of record, Glenn R. Beustring, hereby appeals. . . . " However, the caption in the notice of appeal lists all the parties from the district court and the Plaintiff's brief on appeal says it is filed by "MARILYN SLAY, as Personal Representative of the Estate JAMES ALBERT 'BERT' SLAY, and on behalf of herself as surviving widow, the minor children *and parents* of JAMES ALBERT 'BERT' SLAY. . . . ." (Emphasis added.)

Our rules provide: "The notice of appeal shall specify the party or parties taking the appeal." Fed. R. App. P. 3(c). Because the body of the notice of appeal fails to state the parents are appealing, they arguably are not before this court and any reference to them in any document filed on appeal is irrelevant. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) (Fed. R. App. P. 3(c) is a jurisdictional requirement and is never waived); *In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988) (same). *See also Allen Archery, Inc. v. Precision Shooting Equip., Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988) (when text of

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appeal, raising numerous issues, following a jury verdict for the Appellee Ford Motor Company (hereinafter "Ford"). The separate issues raised by the Plaintiff are dealt with in the body of this order and judgment and, for the reasons that follow, we affirm the judgment of the district court as to all issues. Before addressing Plaintiff's arguments, we first briefly review the facts.

I.

This case is a manufacturer's product liability action brought under diversity jurisdiction, 28 U.S.C. § 1332, following an accident involving the deceased and a 1982 Ford LTD automobile. The deceased, a police officer, was injured when he was pinned by the LTD, which was his police car, against another vehicle while he was on duty. The accident happened on October 28, 1986 when the deceased stopped and got out of the car to write some

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notice of appeal omits names contained in the caption, the text governs so only those named in the body of the notice of appeal are proper parties on appeal). *But see King v. Otasco, Inc.*, 861 F.2d 438, 442-43 (5th Cir. 1988) (defendant had adequate notice even though notice of appeal caption did not name children, but only named father who was appealing on behalf of himself and his children). The Slay notice of appeal caption lists the parents as separate parties from Marilyn Slay and no mention is made of the parents in the body of the notice of appeal. Assuming, however, the parents would raise the same issues as Marilyn Slay, their presence or absence as parties is of no consequence to our decision.

Finally, for purposes of clarity, any reference in this order and judgment to Plaintiff's brief in this court is actually a reference to Plaintiff's amended brief filed November 16, 1989.

parking tickets. While unoccupied, the car began to move toward a nearby parked truck and the deceased, alerted by a witness who saw what was happening, made a futile attempt to stop the car by pushing on its front. The car hit the truck, pinning the deceased between the two vehicles and breaking his hips. He died fourteen days later from complications attributable to the accident.

The deceased's family sued Ford for manufacturer product liability. They contended the car was "defective and unreasonably dangerous to its expected and foreseeable users and bystanders." They claimed the LTD automatic overdrive transmission (the "AOD transmission") was defectively designed. They said the transmission allowed a driver to make an incomplete gear shift to park. This defect, they charged, would cause a driver to unknowingly leave the car in neutral and allow the car to roll. They further argued Ford was aware of the defect and failed to recall the car or warn customers and drivers.

Ford denied the allegations and said the deceased did not put the car in park before exiting. Ford claimed there was no transmission failure. Instead, Ford said the deceased left the car in drive and blamed the accident on his alleged failure to use "ordinary care in the operation of the vehicle and his disregard of the dictates of common sense and safe and reasonably prudent procedures for the operation of such a vehicle." Having summarized the case, we now turn to the issues on appeal.

II.

Plaintiff believes the trial court erred by prohibiting her from presenting evidence to the jury concerning

incidents occurring prior to 1980 relating to the alleged Ford transmission defect. At the pre-trial conference of May 8, 1989, the court said:

> The Court's view of the limitation of this case, after we have had our discussions here this afternoon, is that in its present posture we will deal with the AOD transmission which started in 1980 and plaintiff will present evidence of the alleged defects in the AOD transmission starting in 1980. *However, I would allow the plaintiff to show a basis for the development of the AOD transmission by the letter that went out to Ford customers in 1981 dealing with transmissions between 1971 to 1979. However, the plaintiff would be precluded from bringing forth incidents prior to 1980, incidents prior to the development of the AOD transmission.* And that in my view is about the only fair way to circumscribe this case in its present posture, because the defendants have been dealing with a 1982 Ford LTD AOD transmission in their preparation. The plaintiffs say there is no possible way they could think that would be the limitation of it, but they represent to the Court that has been it. The plaintiff has been dealing in his preparation from the late 1960s forward.

(Emphasis added.) Plaintiff wanted to introduce evidence about the alleged AOD transmission defect dating back to 1968. Plaintiff contends the limit on pre-1980 evidence prevented the jury from rendering a verdict on the merits of their claim, and argues the court's limit was "totally arbitrary and against the great weight of prior pleading and conduct of the parties." She believes the "jury is entitled to know Ford's knowledge and the historical background for the *defect* being contested." (Emphasis in original.)

Ford responds by arguing the Plaintiff did not sufficiently cite to the trial record in her appellate brief indicating where she objected to the exclusion of this evidence during trial.[2] Assuming Plaintiff properly briefed the issue to this court, Ford goes on to argue the trial judge correctly refused the evidence as cumulative and hearsay. According to Ford, the evidence could only be admitted to show Ford had notice and knowledge of the alleged transmission defect. Moreover, even if the judge could have admitted the evidence, Ford contends its exclusion damaged no substantial right of the Plaintiff so as to require reversal on appeal under Fed. R. Evid. 103(a).[3] Ford believes the Plaintiff suffered no harm by excluding the evidence of the alleged transmission defect prior to 1980 because Ford admitted it "received notice of a claimed defect from owners and operators of motor vehicles that unexpected, inadvertent vehicle movement had resulted in situations where vehicles, unattended and attended, had moved and the customers were claiming

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[2] Our rule regarding citation to the record provides:

> Whenever an appeal is based upon a failure to admit or exclude evidence, or the giving or refusal to give a particular jury instruction, or any other act or ruling for which a party must record an objection to preserve the right to appeal, the party shall state where in the record a proper objection was made to the ruling and whether the objection is recorded and ruled upon.

10th Cir. R. 28.2(e).

[3] Fed. R. Evid. 103(a) states in relevant part: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

that the vehicles moved as a result of a vehicle malfunction or vehicle fault."

Plaintiff objected to this admission by Ford by stating it would prevent her from proving Ford knew of a transmission problem in the early 1970s and "Ford's knowledge of pre-1980 history of the design defect . . . to establish the predicate for the duty to warn and on the foundation for punitive damages." The pre-trial order is part of the record on appeal and Plaintiff referred to this admission in her brief. Also, Ford refers to the transcript in its brief where the parties discussed at trial whether the Plaintiffs could make references to incidents of the alleged transmission defect before 1980. Thus, our attention is sufficiently directed to this issue on appeal.

In its brief, Ford points out the trial court admitted a 1981 letter from Ford informing owners the National Highway Traffic Safety Administration ("NHTSA") determined pre-1980 Ford vehicle transmissions were defective.[4] Also admitted was a Ford warning sticker and letter

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[4] This exhibit was identified at trial as Plaintiff's Exhibit 166-A. The NHTSA letter states, in relevant part:

> On June 9, 1980, the National Highway Traffic Safety Administration (NHTSA) made an initial determination that a defect which relates to motor vehicle safety exists in 1970-1979 and certain 1980 Ford vehicles equipped with FMX, C-3, C-4, C-6 or JATCO automatic transmissions. According to NHTSA's initial determination, the park gear may not be securely engaged after the operator has attempted to shift the gear selector lever to "P" (Park) and the transmission may shift to reverse by

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from Ford to its dealers discussing how to answer consumer questions about the alleged defect.[5] Furthermore, a former Ford engineer testified at trial that the first time he investigated an accident and determined it was caused by the consumer leaving the gear shift between park and reverse was 1977 or 1978. Finally, the jury heard Ford's admission concerning the alleged transmission defect during jury instructions.

As previously stated, Plaintiff believes the trial court's exclusion of voluminous pre-1980 evidence of the alleged transmission defect irreparably damaged her case. Plaintiff asserts the court was "vapor-locked" by its decision and argues the ruling deprived her of the legitimate moral force of her evidence. Plaintiff cites Wigmore for the proposition that a "colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence;* furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations . . . , so as to be technically but not practically a waiver of proof." 9 Wigmore on Evidence § 2591 (Chadbourn rev. 1981) (emphasis in original).

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itself without warning, allowing the vehicle to move when it is unattended. NHTSA also initially determined that such uncontrolled vehicle movement may result and has resulted in injury to or death of the occupants of the vehicle or to persons outside the vehicle.

[5] The warning sticker accompanied the NHTSA letter sent to owners and was admitted as Plaintiff's Exhibit 166-B. The letter to Ford dealers was received as Plaintiff's Exhibit 154.

The district court's decision to limit Plaintiff's introduction of pre-1980 evidence is a decision on whether to admit or exclude evidence and is generally governed by federal law. *Romine v. Parman*, 831 F.2d 944, 944-45 (10th Cir. 1987). Such a decision is reviewed for abuse of discretion. *Boren v. Sable*, 887 F.2d 1032, 1033 (10th Cir. 1989); *United States v. Rodriquez-Pando*, 841 F.2d 1014, 1018 (10th Cir. 1988). We have noted:

> Fed. R. Evid. 103 instructs that unless a substantial right of the objecting party is affected, any error in the admission or exclusion of evidence is harmless. Consequently, we review the district court's evidentiary rulings by considering the record as a whole. The onus of establishing reversible error rests with the complaining party.

Wheeler v. John Deere Co., 862 F.2d 1404, 1407 (10th Cir. 1988) (citations omitted).

With this standard in mind, we affirm the district court's ruling rejecting the introduction of pre-1980 evidence of the alleged transmission defect. The court clearly did not prevent Plaintiff from introducing all evidence about Ford's notice and knowledge. For example, there was no total ban on evidence addressing Ford's notice and knowledge going back almost seven years from the date of the October 1986 accident that injured Officer Slay. In addition, Ford admitted "notice of a claimed [transmission] defect from owners and operators of motor vehicles." This admission was read to the jury and Plaintiff's counsel was free to refer to it during closing argument. Moreover, despite the court's limiting order there was at least one instance during the trial

where a former Ford engineer testified he was investigating transmission defect accidents as early as 1977 or 1978. Finally, the jury had three pieces of documentary evidence to refer to during deliberations indicating Ford knew of possible car transmission problems in 1980.

Armed with this evidence, Plaintiff's counsel could plausibly argue to the jury that Ford had notice and knowledge about the alleged transmission defect well before Officer Slay was injured. There was sufficient evidence for counsel to argue there was both a "historical background" and a "predicate on Ford's duty to warn." Accordingly, we hold the district court's limitation on the introduction of old and cumulative evidence regarding Ford's notice and knowledge was not an abuse of discretion and no substantial right was affected. Fed. R. Evid. 103.

We further perceive from Plaintiff's amended brief on appeal a complaint about the disclosure of information Ford made during discovery. Apparently, Plaintiff complains Ford was not forthright and intentionally failed to deliver reports of transmission defects requested during discovery. Ford identifies the problem as a difference between the parties in interpreting the scope of an interrogatory propounded by the Plaintiff to Ford. Reviewing the pre-trial conference transcript where this issue was discussed, we agree it was a discovery dispute between the parties. This dispute influenced the district court's decision to preclude the Plaintiff from introducing voluminous evidence at trial focusing on the alleged transmission defect prior to 1980, and to elicit the compromise admission from Ford concerning the complaints about its transmissions. The court was justifiably concerned at the

pre-trial conference about the need to "define the issues to be tried in this case at this point because here we are moving the monster down to trial."

While the Plaintiff unnecessarily provided us with a twenty-three volume record plus three addenda to review on appeal, we have not found anywhere in this material the disputed interrogatory or Ford's response.[6] Nevertheless, viewing this contention as a discovery dispute,

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[6] Our rules are plain enough. Unnecessary transcripts contribute to the delay and expense of an appeal. 10th Cir. R. 10.1.1. "Only those portions of the transcript and original papers filed in the district court which are relevant to specific arguments made in the briefs may be designated for inclusion in the record on appeal. References to the record should not be made unless essential to the issues on appeal." 10th Cir. R. 10.2.1.

> When an appeal is based upon a challenge to the admission or exclusion of evidence . . . a copy of the pages of the reporter's transcript at which the evidence, offer of proof, instruction, ruling, or order and any necessary objection are recorded must be included. *It is intended that the number of pages reproduced from the reporter's transcript be strictly limited to those absolutely essential for review.*

10th Cir. R. 10.2.3 (emphasis added).

Plaintiff's counsel ignores these rules. For example, Volume IV of Plaintiff's record is labeled as an offer of proof that was presented to the trial judge. This "offer of proof" consists of two depositions of 189 pages and 139 pages respectively, given by a Ford witness from two other cases where he participated. Giving us complete and lengthy depositions from other cases is totally unnecessary and does not aid this Court in focusing on the legal issues necessary to decide this case. By so doing, Plaintiff's counsel violates our rules and acts without common sense.

which it was, we affirm the district court's decision by applying the abuse of discretion standard already mentioned. Our review of the record as a whole convinces us the district court did not abuse its discretion. *Wheeler*, 862 F.2d at 1407. *See also Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (trial court decision to allow or deny discovery reviewed only for abuse of discretion).

Plaintiff's next apparent complaint is that four pieces of documentary evidence were not admitted at trial. Three of the documents are Ford memoranda dating from 1971 and we find no error in their exclusion because they are merely cumulative evidence.[7]

The fourth document, which is also cumulative, is a 1985 letter from a consumer to Ford complaining about an accident where she said she was injured by her Ford LTD Crown Victoria. She claimed the car started to roll after she parked it. The exhibit was offered and rejected by the trial court at a hearing. Plaintiff argued the exhibit was admissible on the issue of notice and for the reasons established in *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982).[8]

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[7] These documents are: Plaintiff's Exhibit 143; Plaintiff's Exhibit 144; and Plaintiff's Exhibit 145.

[8] At the hearing concerning the admission of the document, the Plaintiff's attorney was questioning Lee Carr, a former Ford engineer, about his knowledge of the incident described in the letter. The following exchange took place:

> Q. (By Mr. Beustring) Are you familiar with an incident involving a 1984 LTD Crown Victoria and a lady by the name of Ms. Ida Fillion, F-I-L-L-I-O-N?

(Continued on following page)

In *Rexrode*, the jury was present when counsel asked a witness if he was familiar with similar accidents involving a laundry press. On appeal, the defense objected to mentioning other accidents in front of the jury when the witness had no knowledge of them. In our decision, we

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A. I'm not sure. If I could see it perhaps I could tell you.

MR. BEUSTRING: And marked Exhibit 282-AZ.

Q. (By Mr. Beustring) Are you familiar with that incident, sir?

A. No, sir, I am not. I have not investigated that. I have not seen any materials about it before.

MR. BEUSTRING: I would offer then 282-AZ on the issue of notice and under the guidelines of Rexrode for the purpose of this hearing.

THE COURT: The offer will be denied.

. . . . .

MR. BEUSTRING: And in connection with the offer, while he's looking at the other one, if I might for the purpose of the record. This involved a lady who was married to a Ford person, a part-time salesman at a Ford agency. She stepped out of her car, placing it in park, she stepped out to check the mailbox. She hadn't closed the door yet but she noticed the car was rolling. Her first impulse was to get back in and reach for the brake. It sounds almost identical to the case that we are involved in. It rolled forward, she saw it coming, she grabbed the door, held on as tight as she could. She was not killed being the difference. The letter is dated October 22, 1985.

expressed a preference for admissibility hearings conducted outside the presence of the jury. *Id.* at 830. Although that preference was not followed in *Rexrode*, we found no prejudice warranting reversal by the mere mention of the other cases in the jury's presence. *Id.*

In this case, the court properly had an evidentiary hearing with the jury absent. Furthermore, while evidence of similar accidents is admissible for purposes of notice of the alleged defect, admitting this exhibit would not establish notice since the witness testified at the hearing he had no knowledge of the incident recounted in the exhibit. *Supra* note 8. Moreover, because he had no knowledge of the incident described, the exhibit was also useless as an impeachment tool. *Julander v. Ford Motor Co.*, 488 F.2d 839, 846 (10th Cir. 1973) (where witness testifies he has no personal knowledge of the complaints contained in an exhibit, the exhibit cannot be used to impeach the witness).[9]

Our review of the document convinces us exclusion is permissible under Fed. R. Evid. 403.[10] While the rule is

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[9] In negligence cases, *Julander* allows admission of documents from other accidents "tending to show negligent design." 488 F.2d at 845. The Plaintiffs here did not sue for negligence. Their only cause of action was for manufacturer's product liability, more commonly known as strict liability. Oklahoma recognizes both causes of action. *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975); *Cochran v. Buddy Spencer Mobile Homes, Inc.*, 618 P.2d 947, 949 (Okla. Ct. App. 1980).

[10] The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by

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to be used sparingly to exclude evidence, *Wheeler*, 862 F.2d at 1408, exclusion is allowed when there is a danger of jury confusion and unfair prejudice due to inflammatory and cumulative evidence that may unduly prolong the trial. Fed. R. Evid. 403. We do not reverse a trial court's decision to exclude evidence unless our review convinces us the trial court clearly abused its discretion and adversely affected the substantial rights of the parties. *K-B. Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155-56 (10th Cir. 1985); *see also* Fed. R. Evid. 103(a).

Most recently, we approved of the exclusion of cumulative evidence in *C.A. Assoc. v. Dow Chem. Co.*, No. 89-1216, slip op., 1990 U.S. App. LEXIS 2015 (10th Cir. Nov. 16, 1990). C.A. Associates sued Dow claiming a building material made by Dow was defective. The plaintiffs sought to introduce evidence from over twenty other buildings where the Dow material was used. Slip. op. at 11. The trial court, however, limited the plaintiffs to similar evidence from fifteen other buildings and we affirmed. *Id.* at 10. "In confining the number of buildings admissible at trial, the lower court prevented the jury from inferring that Sarabond was defective simply because many buildings had been investigated." *Id.* at 12. The same is true here. By limiting the number of reports

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> the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. We assume all evidence discussed in this order and judgment is relevant. Fed. R. Evid. 401, 402.

of other accidents through exclusion of this letter and others, the trial judge made certain the jury would not prejudicially infer the AOD transmission was defective simply because Ford received letters from consumers. As we commented in *C.A. Associates:*

> In the context of rulings under Fed. R. Evid. 403, the task of the trial judge is one of 'balancing the probative value of and need for the evidence against the harm likely to result from its admission.' This is a task to which the trial judge is particularly suited because of his familiarity with the full array of the evidence. Thus, we will not reverse absent a clear abuse of discretion.

Id. at 8 (citations omitted).

We have already recognized the jury's awareness of other incidents of alleged defects, accidents and injuries involving Ford AOD transmissions. It might be a different matter if the witness knew about the incident the letter reported, or if the letter was the only evidence of a similar accident involving a Ford LTD that would have been available to the jury had it been admitted. There might also be sufficient cause to reverse where a defendant used an admission to block the introduction of all evidence concerning similar accidents. This is not the case here, and we hold the trial court did not abuse its discretion in rejecting the 1985 consumer letter to Ford.

III.

Other issues raised by Plaintiff require only brief discussion. Plaintiff asserts the trial court's exclusion of a written out-of-court statement given by a witness to the

accident was wrong. The witness testified at trial via a videotape deposition and his testimony was consistent with the written statement. Plaintiff admits this consistency. There was no error in excluding the written statement, which was hearsay. Fed. R. Evid. 801(d)(1)(B), 802.

Plaintiff strenuously argues that lawyer-conducted voir dire of potential jurors is constitutionally required. This position is meritless. *United States v. Ainesworth*, 716 F.2d 769, 770 (10th Cir. 1983); *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1351-52 (2d Cir. 1974); *Canterbury v. Spence*, 464 F.2d 772, 796 n.149 (D.C. Cir. 1972). *See* Fed. R. Civ. P. 47(a).

Plaintiff next complains the trial judge did not ask potential jurors questions about biases against lawsuits due to the so-called "tort reform" crisis, but cites no place in the record where she raised this objection. Ford, however, shows us where the court asked whether any juror possessed "any religious belief or attitudes toward lawsuits that oppose the filing of a lawsuit by anyone that could affect your view of this case."

"With respect to each issue raised on appeal, the party shall state where in the record the issue was raised and ruled upon." 10th Cir. R. 28.2(d). Plaintiff's failure to meet this basic requirement means we defer to the district court's determination of the issue. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1160 n.6 (10th Cir. 1990) (appeals court will not consider argument on appeal where there is no indication in the record on appeal or in the brief that shows the argument was presented to the district court); *Moore v. Subaru of America*, 891 F.2d 1445, 1448 (10th Cir. 1989) ("Without the record before us to substantiate the general

allegations of error, we must defer to the trial court's decisions in these areas."). Even if we considered the merits, the record reference provided by Ford strongly suggests the Plaintiff got the inquiry she wanted.

The next issue raised by Plaintiff deals with testimonial reference during trial to an Oklahoma statute. Okla. Stat. tit. 47 § 11-1101 (1988) makes it illegal to park a car without "first stopping the engine, and effectively setting the brake." *Id.* Plaintiff objects to any reference to this statute by maintaining it goes to a contributory negligence defense, which is an improper defense in an Oklahoma manufacturer product liability case. Ford counters the statute was used only for impeaching the police officers who testified they never set their parking brake, and to refute Plaintiff's failure-to-warn claim. The trial court twice gave limiting instructions restricting the jury's consideration of the statute to these two narrow points. The limiting instructions adequately circumscribed the jury's consideration of the statute. Admitting the statute for such limited purposes was not a clear abuse of discretion. *Dow Chem. Co. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir. 1990). *Cf. Harvey ex rel. Harvey v. General Motors Corp.*, 873 F.2d 1343, 1356 (10th Cir. 1989) ("Evidence properly excluded in one context is not automatically admitted erroneously in a separate context.").

Plaintiff's counsel alleges fraud by Ford in its evidence preparation. The trial court, which heard the accusations during an in limine evidentiary hearing, precluded Plaintiff's counsel from arguing fraud to the jury. He was free to present evidence highlighting discrepancies he believed existed in Ford's evidence without mentioning fraud. We find no error.

The remaining issues are patently frivolous and have either been withdrawn by Plaintiff or waived. They deserve no discussion. In closing, we feel obliged to comment on the unprofessional conduct of Plaintiff's counsel in this court. He included in his appellate brief a picture of the deceased and his family in an apparent effort to gain sympathy for the family of Officer Slay. This tactic is wholly inappropriate at the appellate court level. We resolve appeals on the basis of the fair and equal application of law. Our judgments are not, and cannot, be swayed by a pedestrian attempt to appeal to sympathy. Suffice it to say we have great sympathy for both the deceased and his family.

All outstanding motions pending in this appeal are DENIED and the judgment of the district court is AFFIRMED in all respects. We commend the district court for its conduct during this case and REMAND the case to the district court so it may address any remaining motions before it, such as motions for costs and sanctions.

AFFIRMED and REMANDED.

Entered for the Court:

WADE BRORBY
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARILYN SLAY, as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased; MARILYN L. SLAY, Surviving Spouse and Widow of JAMES ALBERT "BERT" SLAY; MARILYN L. SLAY, as Natural Mother and Next Friend of MELISSA F. SLAY and JAMES AARON SLAY, Minor Children of JAMES ALBERT "BERT" SLAY, Deceased; and JAMES H. SLAY and ANITA MAXINE SLAY, Surviving Parents of JAMES ALBERT "BERT" SLAY, Deceased,	)	
Plaintiffs,	)	
vs.	)	Case No. 87-C-930-E
FORD MOTOR COMPANY,	)	
Defendant.	)	

JUDGMENT

This action came on for trial before the court and jury, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiffs Marily [sic] Slay, as Personal Representative of the Estate of James Albert "Bert" Slay, deceased, on behalf of the Estate of James Albert "Bert" Slay; Marillyn [sic] L. Slay, as Natural Mother and Next Friend of Melissa F. Slay and

James Aaron Slay, minor children of James Albert "Bert" Slay, deceased; and James H. Slay and Anita Maxine Slay, Surviving Parents of James Albert "Bert" Slay, dec(e)ased, take nothing, that the action be dismissed on the merits, and that the Defendant Ford Motor Company recover of the Plaintiffs its costs of action.

DATED at Tulsa, Oklahoma, this 22 day of Aug, 1989.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARILYN SLAY, as Widow and Surviving Spouse of JAMES ALBERT "BERT" SLAY, Deceased, MARILYN SLAY, as Natural Mother and Next Friend of MELISSA F. SLAY and JAMES AARON SLAY, Minor Children of JAMES ALBERT "BERT" SLAY, Deceased, MARILYN SLAY as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased, and JAMES H. SLAY and ANITA MAXINE SLAY, Surviving Parents of JAMES ALBERT "BERT" SLAY, Deceased,	)	NO. 89-5157
Plaintiff/Appellant,	)	
vs.	)	
FORD MOTOR COMPANY,	)	
Defendant/Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

THE HONORABLE JAMES O. ELLISON
DISTRICT JUDGE

D.C. No. 87-C-930-E

AMENDED BRIEF OF APPELLANT

GLENN R. BEUSTRING
GLENN R. BEUSTRING
and ASSOCIATES
2624 East 21st Street, Suite #1
Tulsa, Oklahoma 74114
(918) 747-1341

ATTORNEY FOR APPELLANT

* * *

IV. DENIAL OF LAWYER CONDUCTED VOIR DIRE IS FUNDAMENTAL ERROR IN VIOLATION OF PLAINTIFFS' INVIOLATE RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY UNDER THE SEVENTH AMENDMENT, U.S. CONSTITUTION AND ARTICLE 2, §19, OKLAHOMA CONSTITUTION.

Plaintiff/Appellant challenges Federal Rule of Civil Procedure 47(a) as being impermissibly overbroad in its application to exclude lawyer-conducted *voir dire* under the Seventh Amendment of the United States Constitution and under Article II, §19 of the Oklahoma Constitution in diversity cases.

See Doc. #113, #114 and #112 filed 3/27/89, and transcript of *Voir Dire* in addended material at #33. See Doc. #147 filed 4/20/89 at 2. See Tr., 7/25/89, Tr. 9:21-11:5; and, See: Hillman, "Who Should Conduct Voir Dire?", International Society of Barristers Quarterly, Vol. 18, No. 3, 322 (1983); Lay, "In a Fair Adversary System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 13 The Judges Journal 63, 64 (1974); McGuirk and Tober, "Attorney Conducted Voir Dire: Securing an Impartial Jury," 15 New Hampshire Bar Journal 1,6 (1973); Gutman, "The Attorney Conducted Voir Dire of Jurors: A Constitutional Right," 39 Brooklyn Law Review 290, 294-5 (1972); *U.S. v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977), *Cert. denied*, 434 U.S. 902; *U.S. v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977); *Baltimore & Carolina Line, Inc., v. Redband*, 295 U.S. 654, 55 Sup. Ct. 890, 79 L.Ed. 1636 (1935); *Seymour v. Swart*, 695 P.2d 509, 511-512 (Okl. 1985); *Rule 6, Rules for District Courts of Oklahoma; Fietzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980); *United States v. Whitt*, 718 F.2d 1494 (10th Cir. 1983); *Photostat Corp. v.*

Ball, 338 F.2d 783, 785 (10th Cir. 1964); *Harold v. Cronin*, 846 F.2d 1148, 1152 (8th Cir. 1988); *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981); 62 ABAJ 1282 (1976); Hamilton, *Federalist Papers*, No. 78.

V. THE TRIAL COURT'S REFUSAL TO ASK REQUESTED VOIR DIRE AIMED AT EXPOSING BIAS OR PREJUDICE RESULTING FROM CONTROVERSY OVER TORT REFORM DENIED PLAINTIFFS THEIR OKLAHOMA AND UNITED STATES CONSTITUTIONAL RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY.

Plaintiff/Appellant lost their constitutional right to a fair and impartial jury when the Trial Court refused to ask *any* questions concerning the potential for bias and prejudice resulting from the controversy over "tort reform" in this federal diversity case. See *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705 (Texas 1989). See *Voir Dire* transcript in addended materials at #33 – Trial, 7/25/89, Tr. 9-11. See: *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Fietzer v. Ford, supra; Darbin v. Nourse, supra; United States v. Hall*, 536 F.2d 313, 324 (10th Cir. 1976); *Kiernan v. Schaik*, 347 F.2d 775 (3d Cir. 1965); *Aldridge v. United States*, 283 U.S. 308 (1931); *Seller v. United States*, 106 U.S. App. D.C. 209, 271 F.2d 475 (1959); *Hoffman v. Perrucci*, 117 F.Supp. 38 (E.D. Pa. 1953), appeal dism'd, 222 F.2d 709 (3d Cir. 1955); *Borkoski v. Yost*, 594 P.2d 688 (Mon. 1979); 62 A.B.A.J. 68,69 (1979); Wade, "An Evaluation Of The 'Insurance Crisis' and Existing Tort Law," 24 Houston L.Rev. 81 (1987); *Wall Street J.*, Aug. 1, 1986, at 1; Kronzer, "Jury Tampering – 1978 Style," 10 St. Mary's L.J. 399, 416 (1979); additional editorials and articles, some with letter

responses from Plaintiffs' counsel, are appended at #31 as supplement to Doc. #114 filed 3/27/89, for which Judicial Notice is requested.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARILYN SLAY, as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased, on behalf of The Estate of JAMES ALBERT "BERT" SLAY, Deceased, et al.,	)	
Plaintiffs,	)	
V.	)	No. 87-C-930-E
FORD MOTOR COMPANY,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JULY 25, 1989
JURY TRIAL

BEFORE THE HONORABLE JAMES O. ELLISON, Judge.

APPEARANCES:

For the Plaintiffs: Glenn R. Beustring
2624 East 21st Street, Suite 1
Tulsa, Oklahoma 74114

For the Defendant: Elsie Draper and
Dennis Cameron
Gable & Gotwals
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119

Glen R. Dorrough
UNITED STATES COURT REPORTER

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MR. BEUSTRING: With regard to opening statement or voir dire, I mean, to the jury, the plaintiff would object to any reference or inquiry regarding worker's compensation. I think that's indirectly injecting into the case an improper subject matter. The Court is aware of my serious concern and [p. 10] request for voir dire, lawyer-conducted voir dire, which I understand the Court has denied.

THE COURT: Yes.

MS. DRAPER: [sic] MR. BEUSTRING: And which I think it's my obligation for the record to say that I think it's in violation of the Seventh Amendment right to an unbiased jury selected by their lawyer. However, I am concerned because of the publicity in this community not only from the papers but from a great deal of invested dollars to foster the idea of reckless jury awards, to foster the idea of a lawsuit crisis, and I would assume that these jurors will come in here somewhat prejudiced. And I'm asking the Court to make sure that at least in this case that they will put aside any preconceived notions and give this family a fair trial and put aside any type of prejudices or biases concerning our system of jurisprudence, because I think it's been a form of jury tampering that's been going on. Consumers of America have not put any money up to counter that, what I believe to be over a hundred million dollars spent. And if I had enough time and a little money and a little authority I think I could prove that. But that's the serious concern I have.

THE COURT: I understand. But this Court in this case cannot resolve all the differences between plaintiffs and defense bar in the United States –

MR. BEUSTRING: That's true, but you can assure us –

[p. 11] THE COURT: – between the insurance industry and the plaintiff's lawyers. I can't solve all of those. All I can do is voir dire this jury in a hope and a belief that we can come up with one that is available to fairly decide this case. That's what we're going to do.

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